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NOFAL FIRHAT ABDULLAH & ORS v. KUMPULAN SEMESTA SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
ELAINE YAP CHIN GAIK JC
[CIVIL SUIT NO: BA-23NCvC-27-06-2023]
17 SEPTEMBER 2025

B

Abstract – *(i) The ownership interest of the river encroachment area on a private land parcel, wherever it may be situated, is always vested in the State. The State's proprietary right is preserved regardless of whether a memorial reflecting the change has been entered on the land's register document of title; (ii) The employer of an independent contractor is generally not vicariously liable for any tort committed by the independent contractor in the course of executing the contracted works, if there is no evidence to suggest the employer exercised hands-on control or was otherwise responsible for the contractor's operations.*

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TORT: *Trespass – Damages – Claim – Claim by landowners – Allegations that sand mining activities caused river running through landowners' land to widen, deepen and erode banks, reducing land area and causing destruction of trees on land – Whether there was trespass – Whether landowners had necessary locus standi to initiate claim*

E

TORT: *Negligence – Damages – Claim – Claim by landowners – Allegation that tortfeasors negligent in carrying out sand mining activities – Sand-mining activities caused river running through landowners' land to widen, deepen and erode banks, reducing land area and causing destruction of trees on land – Whether negligence established – Whether landowners had necessary locus standi to initiate claim*

F

TORT: *Liability – Independent contractor – Claim by landowners – Allegation that tortfeasors negligent in carrying out sand mining activities – Sand-mining activities caused river running through landowners' land to widen, deepen and erode banks, reducing land area and causing destruction of trees on land – Whether employer liable for acts of independent contractor – Whether employer exercised hands-on control over independent contractor's operations – Whether independent contractor liable to indemnify employer if it was found liable for damages*

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The plaintiffs owned Malay reserve agricultural lands; the first plaintiff owned Lot 1251 while the second and third plaintiffs jointly owned the adjacent Lot 1252. The first defendant had a permit to extract river sand from a 520m length of Sungai Batang Kali, covering the length that flowed through Lots 1251 and 1252. The second defendant, an independent contractor, was

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appointed by the first defendant to carry out the river sand mining operations. In 2022, Sungai Batang Kali flowed through both Lots 1251 and 1252. The plaintiffs filed the present claim, seeking damages against the defendants, for trespass on Lots 1251 and 1252 and negligence in carrying

out their sand mining operations. According to the plaintiffs, the second defendant's sand mining activities caused the river running through their land to widen, deepen and erode the banks, thus reducing the land area and causing destruction of trees on the lands. The defendants, on the other hand, argued that: (i) the second defendant operated with approval from Lembaga Urus Air Selangor ('LUAS'), in accordance with the law and all permit requirements, and did so within the river and river reserve which belonged to the State; (ii) the plaintiffs had no *locus standi* to claim trespass and failed to prove any negligence or recoverable damages; and (iii) the first defendant owed no duty of care to the plaintiffs. The first defendant contended that the second defendant was liable to indemnify the first defendant if it was found liable for damages. By way of counterclaim, the second defendant asserted that: (i) the second plaintiff had approached the second defendant to beautify the riverbank at Lot 1252 in exchange for non-interference in the second defendant's sand mining activities. The second defendant allegedly incurred RM50,000 but the second plaintiff reneged on their agreement by complaining of trespass; and (ii) the plaintiffs' complaints were libellous.

Held (dismissing claim and counterclaim):

(1) Ownership interest of the river encroachment area is always vested in the State, whether or not an entry is made on the register. Until a memorial is entered, all it means is that the world will have no notice of the change. The plaintiffs lacked the *locus standi* to complain about the defendants' sand mining operations at the river encroachment area since they had no proprietary interest in those areas within their lots. They acquired Lots 1251 and 1252 subject to the State's rights. They could not pass good title to it in a sale just because there was no memorial to that effect in the register document of title. (paras 36 & 37)

(2) The second defendant was entitled to operate within the river and river reserve, wherever they were found, including at the river encroachment area on the plaintiffs' land. As these land areas did not belong to the plaintiffs, any trespass and damage affecting the areas was a complaint for the State Authority to take issue with, not the plaintiffs. The plaintiffs did not prove, on a balance of probabilities, that any part of the plaintiffs' land beyond the river encroachment area had been trespassed upon. Accordingly, there was no proof of actionable trespass onto the plaintiffs' land. (paras 38 & 49)

(3) The second defendant had all the features of an independent contractor *vis-à-vis* the first defendant, namely: (i) the first defendant did not exercise any hands-on control over the second defendant's sand mining and extraction operations; (ii) the second defendant applied for LUAS approvals in its own capacity, not as an agent, and was therefore independently liable to LUAS for any non-compliance; and (iii) the second defendant provided an express contractual indemnity to the first defendant for liabilities arising from its operations. The employer of an

independent contractor is not responsible for any tort committed by the independent contractor in the course of execution of contracted works unless there is evidence to indicate otherwise. The first defendant's indemnity claim against the second defendant was, however, academic and no orders were made. (paras 81, 82 & 85)

(4) The second defendant's counterclaim for libel, breach of agreement on the cost of the beautification of Lot 1252 and interference with the second defendant's business was not properly pleaded and was not considered. There was no proof of the alleged agreement with the second plaintiff, and as the unproven libel was the basis for any claim for unlawful interference with trade as a tort, all three causes of action failed. (paras 83 & 84)

Case(s) referred to:

Johandra Realty Sdn Bhd & Anor v. Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia & Ors [2017] CLJU 350; [2017] 1 LNS 350 HC ***(refd)***

Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd [1987] CLJU 79; [1987] 1 LNS 79 HC ***(refd)***

Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 46, 49, 72, 353(2), 382A

National Land Code (Amendment) Act 1984, s. 104

Selangor Waters Management Authority Enactment 1999 (Selangor) (EN 2/1999), ss. 2, 43(1)

Waters Act 1920, s. 3

For the plaintiff - Muhammad Arief, Tunku Muhammad Musyrif & Muhammad Aridz Mirzha; M/s Arief & Iskandar

For the 1st defendant - Diane Heng & Lai Jie Xi; M/s Raja, Darryl & Loh

For the 2nd defendant - N Sithradevi & Aznim Azhar; M/s Raja Nor & Su Lynn

Reported by Najib Tamby

JUDGMENT

Elaine Yap Chin Gaik JC:

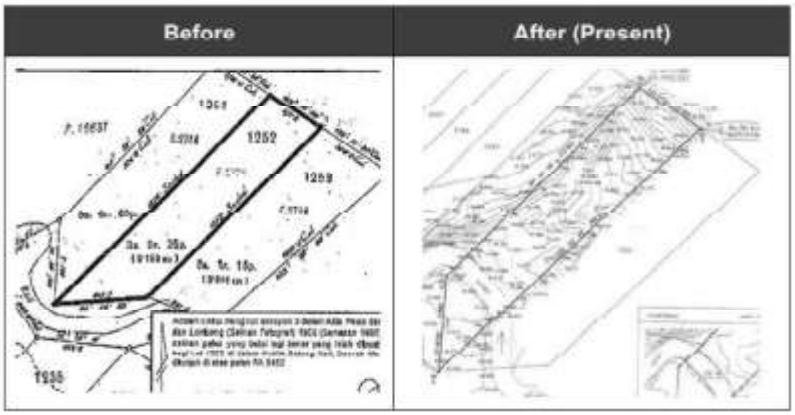
Introduction

[1] The plaintiffs own Malay reserve agricultural lands at Mukim Batang Kali in Hulu Selangor. The first plaintiff's land is held under Title No. 4283, Lot No. 1251 ("Lot 1251"), while the second and third plaintiffs jointly own the adjacent land held under Title No. 650, Lot No. 1252 ("Lot 1252").

[2] In 2022, Sungai Batang Kali flowed through both Lot 1251 and Lot 1252. The plaintiffs filed this suit to claim damages against the defendants for trespassing and negligence when the second defendant carried on river sand mining and extraction along Sungai Batang Kali. The second defendant counterclaimed for damages caused by an order from the first defendant to suspend its activities due to the plaintiffs' complaints.

Background Facts

[3] The parties did not seriously dispute that the course of Sungai Batang Kali had changed over time, and while in the official survey plan by Jabatan Ukur dan Pemetaan Malaysia ("JUPEM") attached to the title to Lot 1251 and Lot 1252, the river did not flow through the lots, they now do.



[4] An unofficial survey plan carried out in 2022 and adduced by the plaintiffs (shown above) and Google Earth images of the location of the river flowing through Lot 1251 and Lot 1252 tendered in evidence were consistent and accepted as accurate representations of the changed course of the river.

[5] Sungai Batang Kali had clearly advanced significantly into Lot 1251 and Lot 1252.

[6] At all material times, the first defendant had a permit to extract river sand under s. 72 of the National Land Code 1965 ("NLC") from a 520metres length of Sungai Batang Kali covering the length that flows through Lot 1251 and Lot 1252. This is a permit to extract, remove and transport rock material issued by the Land Administrator.

[7] It is not disputed that the second defendant was appointed by the first defendant as its contractor to carry out the river sand mining operations or that the terms and conditions found in various offer and extension letters since 14 November 2011 governed their relationship ("contract").

[8] The plaintiffs allege that the second defendant trespassed in 2020, though this is unproven, as the only physical evidence of the alleged trespass is from photographs taken in 2022. In any case, it is in evidence that the second defendant's sand mining contract had been extended by consecutive one-year terms between 1 January 2020 to 31 December 2022.

[9] As required under the contract, the second defendant procured written approvals from the Director of the Selangor Water Management Board (*ie*, Lembaga Urus Air Selangor or "LUAS") under s. 43(1) of the Selangor

Waters Management Authority Enactment 1999 to carry on sand mining activities along Sungai Batang Kali. There is evidence of such approvals for consecutive one-year periods from 1 January 2020 to 31 December 2023.

[10] By letter dated 26 April 2022, the plaintiffs issued the first letter of demand to the first defendant to cease its sand mining operations at Lot 1251 and Lot 1252. The plaintiffs also demanded damages, said to be in the midst of being quantified.

[11] On 17 May 2022, the plaintiffs' letter of demand was extended to the second defendant with a request to check its operational procedures and a reminder of its contractual obligations, including the following:

(i) obtaining written approval from private land owners if operations are carried out on private land; and

(ii) indemnifying the first defendant on any claims and/or actions from any party related to the second defendant's activities there.

[12] By letter dated 3 June 2022, the second defendant wrote to the second plaintiff to offer RM200 per month for a right of way through Lot 1252. The second plaintiff did not agree.

[13] On 22 June 2022, the plaintiffs issued another letter of demand to the first defendant to claim RM3,940,619.50 in damages due to the trespass on Lot 1251 and Lot 1252.

[14] By letter dated 30 June 2022, the first defendant ordered the second defendant to suspend operations on a without prejudice basis pending investigations.

Competing Contentions

[15] The plaintiffs allege that as a result of the second defendant's sand mining activities, there is:

(i) trespass on Lot 1251 and Lot 1252; and/or

(ii) negligence in carrying out their operations;

causing the river running through their land to widen, deepen, and continue eroding the banks, thus reducing the land area; and the destruction of jungle trees and fruit trees on the lands.

[16] The defendants contend that the second defendant operated with approval from LUAS, according to law and all permit requirements, and did so within the river and river reserve, which belong to the State. Accordingly:

(i) the defendants argue that the plaintiffs have no *locus standi* to claim trespass and failed to prove any negligence or recoverable damage; and

(ii) the first defendant additionally asserted that it owed no duty of care to the plaintiffs at all.

[17] By way of counterclaim, the second defendant asserts the following:

(i) the second plaintiff had approached the second defendant to beautify the riverbank at Lot 1252 in exchange for non-interference in the second defendant's sand mining activities. The second defendant allegedly incurred RM50,000 but the second plaintiff reneged on their agreement by complaining of trespass; and

(ii) the plaintiffs' complaints were libellous.

[18] The first defendant contends that the second defendant is an independent contractor who carried out the sand mining and extraction activities and is liable to indemnify the first defendant if it is found liable for damages.

Analysis And Findings

[19] Considering the pleadings and submissions filed, the issues for determination of this court were as follows:

(i) whether the river and river reserve at Lot 1251 and Lot 1252 are State land;

(ii) whether the second defendant trespassed on parts of Lot 1251 and Lot 1252 that belong to the plaintiffs;

(iii) whether the second defendant was negligent in failing to comply with river sand mining regulations and permit conditions;

(iv) whether the plaintiffs proved the damages claimed;

(v) whether the first defendant is liable to the plaintiffs independently or as a joint tortfeasor, and if so, whether the second defendant is liable to indemnify the first defendant; and

(vi) whether the second defendant proved its counterclaim for libel, interference and breach of agreement on beautification of Lot 1252.

Ownership Of River And River Reserve

[20] The advancing Sungai Batang Kali divided Lot 1251 and Lot 1252 into two plots within each title, with two small triangles of land south of the river on each lot created. It is not disputed by the second defendant that it had carried out sand mining activities on Lot 1251 and Lot 1252 because the river ran through these lands.

[21] As noted, the defendants raised a threshold question on the plaintiffs' *locus standi* to sue. This turns on whether, in fact and in law, the length of Sungai Batang Kali that traversed Lot 1251 and Lot 1252 and all land up to 50metres on either side of the river's edge which is understood to be river reserve land ("river encroachment area") have reverted to the State Authority in Selangor, notwithstanding the absence of a memorial to that effect on the register document of title.

[22] According to s. 46 of the NLC, any alienated land affected by encroachment by the sea or any river shall revert to and vest in the State Authority in accordance with s. 49. Sections 46 and 49 read as follows:

> Section 46
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> (1) Without prejudice to the provisions of any other written law for the time being in force, alienated land shall revert to and vest in the State Authority in the following circumstances:
>
> (a) ..
>
> (b) ...
>
> (c) ...
>
> (e) ...
>
> (d) ...
>
> (e) ...
>
> and any part of alienated land affected by encroachment by the sea or any river shall revert to and vest in the State Authority in accordance with s. 49.
>
> Section 49
>
> Where the shore-line or the bed of any river advance so as to encroach on any alienated land, the area affected by the encroachment shall thereupon cease to form part of that land, and shall become State land; but the boundaries of alienated land shall not (except in the circumstances mentioned in paragraph (i) of the proviso to sub-section (2) of s. 353) be affected by any retreat of the shore-line or of the bed of any river.

[23] Since s. 49 of the NLC refers to s. 353 of the NLC on the resurvey of land alienated before commencement by reference to natural feature boundaries, it is also instructive to set out s. 353:

> (1) Where any land alienated before the commencement of this Act is expressed in the document of title thereto to extend to a boundary or boundaries consisting of any natural feature, the Director of Survey and Mapping shall, at the request of the State Director, cause the boundary or boundaries in question to be determined by right lines.
>
> (2) Where the natural feature referred to in sub-s. (1) consists of the foreshore, the coastline or the sea, a river or riverbank, or any other feature the line of which is liable to alter from time to time, then, for the purposes of this section the boundary shall be taken to follow any survey traverse made for the purpose of determining the line of that feature at the time the land was alienated:
>
> Provided that:
>
> (i) the traverse shall be disregarded to the extent, if any, necessary to take account of any advance of the shoreline, or of the bed of any river;

(ii) unless the proprietor of the land would thereby become entitled to an area substantially greater than that specified in his document of title, the traverse shall also be disregarded to the extent, if any, necessary to include within the boundaries of the land any revetment, sea wall, river wall or other structure lawfully erected by the proprietor or any predecessor in title.

[24] Section 49 of the NLC distinguishes between the effect of advancing as opposed to retreating river beds in that it provides that the boundaries of alienated land are not generally affected by the retreat of riverbeds, but they are affected by advancing riverbeds.

[25] It is clear from the original JUPEM survey attached to the titles of Lot 1251 and Lot 1252 that their boundary lines near the river were right lines dictated by the flow of Sungai Batang Kali as a natural feature. In this context, the proviso in s. 353(2) of the NLC also explains that the survey traverse used to mark the boundary at the time of alienation is to be disregarded to account for advancing riverbeds.

[26] In other words, landowners cannot gain land by retreating riverbeds across their land, but they can lose land by advancing riverbeds.

[27] Now, the plaintiffs argue that Sungai Batang Kali and its banks on Lot 1251 and Lot 1252 do not belong to the State in this case because there is no memorialisation of that fact on the register document of title of those lands according to s. 382A of the NLC, which reads as follows:

(1) The Land Administrator shall upon being satisfied that any alienated land or part thereof has become State land under s. 49, make or cause to be made a memorial to that effect in the register document of title to the land.

(2) The Registrar shall after making a memorial under sub-section (1):

(a) notify the proprietor thereof of the making of such memorial,

(b) call for the production of the issue document of title in accordance with s. 15, and

(c) make the like memorial on the issue document of title or, in the case where the whole land has become State land, destroy the subsisting issue document of title.

[28] Section 382A was inserted by s. 104 of the National Land Code (Amendment) Act 1984 (Act A587) to provide for a memorial to be made on the register document of title "upon being satisfied that any alienated land or part thereof has become State land" because of the encroachment of a river, just like in this case.

[29] The plaintiffs rely on the case of *Johandra Realty Sdn Bhd & Anor v. Ketua Pengarah Jabatan Pengairan dan Saliran Malaysia & Ors* [2017] CLJU 350; [2017] 1 LNS 350 ("*Johandra*"). There, the plaintiffs were the owners of five parcels of land located in Pontian, Johor. The first defendant acquired some parts of the land for the construction of an earth embankment along

Sungei Pinggan and the realignment of the river. As a result, the original land was split into two and the unacquired land which was exposed to overflow during high tide became worthless.

[30] In *Johandra*, the plaintiffs sued for trespass, claiming that there was overuse of 3.7373 acres of their land since 1967 and trespass over 16.7895 acres used as a floodplain. The defence that the affected lands had reverted and vested in the State Authority was rejected because the High Court found no entry on the register document of title according to s. 382A of the NLC.

[31] It is not obvious from the description of the facts in *Johandra* that s. 49 of the NLC applied. In any case, after reviewing the statutory provisions and case precedents, this court would respectfully disagree with the proposition that the entry of a memorial on the State's rights to the river and river reserve according to s. 382A of the NLC is a precondition for the vesting of property in the same.

[32] According to s. 46 of the NLC, "any part of the alienated land affected by encroachment by the sea or any river shall revert to and vest in the State Authority in accordance with s. 49" and pursuant to s. 49 of the NLC, "... the area affected by the encroachment shall thereupon cease to form part of the land, and shall become State land ...".

[33] The language used in ss. 46 and 49 of the NLC is clear in its intent to vest property in rivers in the State automatically by operation of law. Unlike other subsections in s. 46 of the NLC, the circumstance represented by s. 49 of the NLC is not expressed as being subject to s. 382A of the NLC or any other written law.

[34] The language of s. 382A of the NLC also suggests that the entry of a memorial is procedural and does not operate to confer or deny any substantive rights because it is only operative upon satisfaction that any part of the alienated land "has become State land under s. 49". It is also relevant that s. 382A of the NLC was only introduced in 1984, whereas ss. 46 and 49 have always been in the NLC.

[35] In fact, the plaintiffs accept that Sungai Batang Kali is subject to s. 3 of the Waters Act 1920, which provides that "the entire property in and control of all rivers in any State is and shall be vested solely in the Ruler of such State". It is further subject to the Selangor Waters Management Authority Enactment 1999, which provides for the following definitions in s. 2:

> "river'' means any stream, natural watercourse or any tributary of a river or any artificial deviation thereof and any instream impoundment thereon.
>
> "river reserve" means the river and the landward extent of the flood plain located within a distance of 50 metresof the normal high water mark of the river or such other distances as may be prescribed by the Authority and includes any designated river reserve.

[36] Based on the above, it must necessarily follow that ownership interest of the river encroachment area always vested in the State, whether or not an entry of a memorial is made on the register. Until a memorial is entered, all it means is that the world will have no notice of the change.

[37] As it relates to the plaintiffs' claim of trespass therefore, the inevitable legal consequence is that the plaintiffs lack *locus standi* to complain about the defendants' sand mining operations at the river encroachment area since they have no proprietary interest in those areas within their lots. They acquired Lot 1251 and Lot 1252 subject to the State's rights. They could not, for example, pass good title to it in a sale just because there is no memorial to that effect in the register document of title.

Proof Of Trespass

[38] If this court is right on the threshold question, the second defendant was entitled to operate within the river and river reserve wherever they are found, including at the river encroachment area on the plaintiffs' land. As these land areas do not belong to the plaintiffs, any trespass and damage affecting the areas is a complaint for the State authority to take issue with, not the plaintiffs.

[39] That said, the matter does not necessarily end there. The plaintiffs asserted in closing submissions that there was also trespass beyond the river and river reserve. The Selangor Waters Management Authority Enactment 1999 defines the river reserve as the river and landward plain within 50metres from the normal high-water mark of the river "or such other distances as may be prescribed by the Authority".

[40] In post-trial reply submissions, counsel referred for the first time to a Circular 2/2010 issued by Ketua Pengarah Tanah dan Galian Persekutuan titled "Garis Panduan Penetapan Lebar Rizab Sungai Yang Seragam Bagi Sungai-sungai Yang Tidak Diwartakan" ("circular"). The plaintiffs used it to argue that the river reserve is only 7metres because the original width of the river was 7metres.

[41] This court disregarded the circular as:

(i) it was not apparently issued by the State Authority whose jurisdiction it is to manage rivers belonging to the State; and

(ii) it was not pleaded, raised as an issue or tendered during the trial.

Based on the evidence of the second defendant's witness, Nor Zamri bin Sondor, Ketua Penolong Pengarah Bahagian Perancangan dan Pembangunan in Lembaga Urus Air Selangor (LUAS) (DW5), the second defendant had been given permission to use the river reserve up to 50metres from the high-water mark. It was not put to him at the trial, that the river reserve was only 7metres according to the circular.

[42] This court also notes that the original width of the river was not established in evidence. What is contended as the width of the river reserve is also not what the circular says. In any case, while it makes sense that the size of river reserves should be proportional to the width of the river they flank, the assertion that the river reserve is 7metres wide was not pleaded or proved.

[43] In any case, the plaintiffs rely on photographs taken by the first plaintiff during what appears to be a picnic in July 2018 and compared photographs of the river and surroundings that the first plaintiff took in 2022. Most of the photographs were of the river and areas immediately adjacent to the river.

[44] The facts established are that the second defendant used a dragline excavator, and all excavating and stockpiling activities were carried out from the smaller plot of land south of the river. There is no cogent evidence that the other river bank was disturbed by the second defendant's activities or that there were any man-made disturbances at all.

[45] Apart from the photographs, there is also the following evidence:

(i) a letter dated 3 June 2022 from the second defendant to request a right of way from the second plaintiff; and

(ii) the recent unofficial survey plan referred to earlier in this judgment which was prepared by Zamil bin Ismail (PW3) at the request of the first plaintiff in March 2022, accompanied by a river profile, and the Google map views.

[46] For lack of better evidence, this court considered PW3's survey plan and river profile and found that only a small area of land on Lot 1251 and Lot 1252 might conceivably lie beyond the river encroachment area if at all, using the estimated width of the river from the accompanying river profile as an approximate scale for the survey plan. According to PW3's survey, the river was approximately 15metres wide.

[47] Similarly, the aerial view on Google maps showed that apart from the sandy bank of the river, much of Lot 1251 and Lot 1252 shrouded in jungle and did not reveal any obvious areas of trespass:

[48] There is no other cogent objective evidence that the second defendant used any other part of the land outside the river encroachment area. Photographs taken by the first plaintiff have no coordinates or other reference points to gauge their actual location. To illustrate:

(i) the photographs of sand stockpiles have no point of reference;

(ii) the first plaintiff himself placed the uprooted trees he photographed in 2022 at a point (K) on the survey plan that was outside the boundary lines of Lot 1251 and Lot 1252 altogether; and

(iii) the second plaintiff claimed that his fruit trees were damaged at the point he marked (S) on the survey plan which was outside the areas identified by the plaintiffs in further and better particulars as the areas so affected.

[49] Considering the evidence, this court finds that the plaintiffs did not prove on a balance of probabilities that any part of the plaintiffs' land beyond the river encroachment area had been trespassed upon. Accordingly, this court finds no proof of actionable trespass onto the plaintiffs' land.

Negligence

[50] On the claim in negligence, this court finds that since damage is an element of the tort, then on the same threshold issue of land ownership and locus standi, the plaintiffs claim similarly fails. In this case, there was no proven damage to the plaintiffs' property, nor any proven case of pure economic loss associated with the acts of negligence complained of.

[51] To recap, the plaintiffs' primary complaint is that the defendants were negligent in their conduct of the sand mining activities in that the defendants had allegedly failed to comply with guidelines issued by the Jabatan Pengairan dan Saliran Malaysia ("JPS Guidelines"), and caused damage to the river and river banks.

[52] In closing submissions, the plaintiffs also submitted that the defendants were negligent during pre-execution of operations, in that the second defendant was supposed to have submitted the following to the first defendant for transmission to the approving authorities:

> (i) Pelan lokasi beserta pelan susunatur dan pelan kunci kawasan yang disediakan oleh jurukur berlesen. Pelan jurukur itu juga hendaklah menunjukkan sempadan aliran sungai, sempadan rizab sungai dan sempadan tanah hakmilik yang berhampiran sungai;
>
> (ii) Pelan keratan rentas sungai di 3 lokasi (sempadan hulu, tengah dan sempadan hilir) yang disediakan oleh jurukur berlesen;
>
> (iii) Skim Cucigali Sungai yang disediakan oleh jurutera bertauliah. lanya hendaklah berdasarkan pelan jurukur;
>
> Dokumen-dokumen ini hendaklah disediakan sekurang-kurangnya sebanyak 5 salinan. lanya akan digunakan bagi mendapatkan Kebenaran Bertulis dari Lembaga Urus Air Selangor (LUAS) dan Jabatan Pengairan dan Saliran (JPS) untuk operasi tuan.

and in breach of its own conditions to the second defendant, the first defendant permitted the second defendant to proceed despite having no written consent of private land owners affected by the sand mining operations.

[53] This second point of contention can be briefly addressed. Although its presentation at trial was somewhat unclear, the second defendant's pleaded case rests on the contention that it was entitled to rely on the official JUPEM survey maps annexed to the registered titles, which indicated that the original course of Sungai Batang Kali did not traverse Lot 1251 or Lot 1252.

[54] This must be right. This court can find no fault in third-party reliance on official surveys at the land registry as the onus to re-survey lands affected by ss. 46 and 49 of the NLC should rightly fall on either the affected landowner or the State of Selangor.

[55] There was also no duty to conduct fresh boundary surveys because the LUAS conditions did not apparently require it. In any case, that is a matter strictly between the first and second defendants and the authorities that approved their activities. Knowledge that the river and river reserve now traverse private property did not affect their rights or those of the plaintiffs over the river and river reserve.

[56] Based on the evidence of DW5 representing LUAS as the approving authority, the second defendant probably did just rely on the land office survey plans. LUAS approved the second defendant's activities along 520metres of Sungai Batang Kali based on just the "dokumen skim cucigali pasir" submitted in 2020 and had no knowledge of property boundaries along the river.

[57] In the case of negligence in the execution of sand mining operations, the plaintiff bears the burden of proof to satisfy the court that a duty of care exists, breach of that duty by the defendants and causation of damage claimed. For argument's sake, this court has no difficulty finding that the second defendant owed a duty of care to private landowners to comply with regulations on sand mining and extraction activities with LUAS permission.

[58] LUAS is a technical agency of the State that oversees river sand mining operations. Additionally, the JPS guidelines govern river sand mining operations. They are detailed and provide guidelines like the following:

(i) sand can only be dredged from the middle 1/3rd of a river;

(ii) no extraction is allowed at bends in the river to avoid erosion of the riverbanks, but extraction of sand from parts where deposits of sand create a convexity in the river bank may be considered; and

(iii) no extraction is allowed from rivers less than 10metres wide except with the approval of JPS.

The conditions of approval for sand mining by LUAS are consistent with JPS guidelines. The standard of care required of the second defendant is to comply with all regulatory conditions of approval as required by the State authorities.

[59] The only alleged acts of negligence that the plaintiffs sought to prove that this court could infer from the pleadings and the evidence were that the second defendant had, in breach of standards of care set by reference to LUAS conditions and/or JPS guidelines, extracted river sand from parts of Sungai Batang Kali on Lot 1251 and Lot 1252 that were too narrow (7metres) and too near the bank.

[60] Although no available surveys showed the river profile at any particular point of the river in 2018 corresponding to those done in 2022, there was photographic evidence adduced at the trial that could be compared. On a balance of probabilities, this court believes that the photographs taken by the first plaintiff are credible and depict the condition of the river and river banks in 2018 and 2022 generally, but:

(i) there is no 2022 photograph of the picnic point; and

(ii) there were no "before and after" photographs of Lot 1252 at all.

[61] The second defendant had clearly accessed and used the sandy banks of the river encroachment area and the condition of the river in 2022 was visibly changed compared to how it was in 2018. The photographs and the approximate locations depicted in the survey plan are reproduced below:

Extract of 2022 survey plan with markings by PW1

Condition of land in 2022

Pg 118 (J)

Condition of land in 2018

Pg 96 (B)

Pg 111 (F)

Pg 98

Pg 106 (D)

Pg 94

Pg 110 (E)

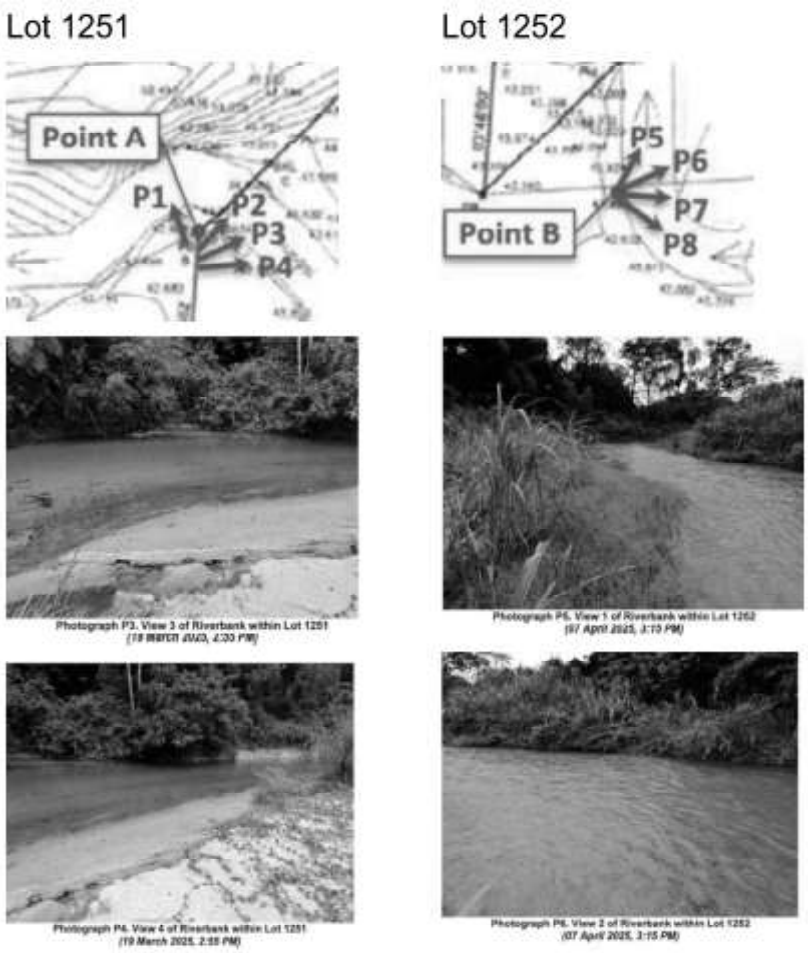
Pg 100

Pg 122 (K)

Pg 102

[62] This court also relied on the photographs taken on 19 March 2024 (Lot 1251) and 7 April 2025 (Lot 1252) by the first defendant's expert, Ir Dr Chan Swee Huat (DW3) who was called to opine on the necessity for permanent sheet pile wall construction to protect the river banks from slope instability and soil erosion.

[63] The photographs by DW3 did have a clearer indicator of location and images of the river at Lot 1251 showed shallow waters, not unlike the photographs of the picnic area looked. If they were dredged, the river bank had largely recovered:



[64] In answer to the plaintiffs' case that permanent sheet pile walls along the entire length of the river and on both river banks in Lot 1251 and Lot 1252 was necessary to remedy the damage caused by the second defendant's activities, DW3 opined that permanent sheet pile walls would be overdesigned, costly, environmentally disruptive, visually incongruent with the natural river surroundings and susceptible to corrosion, requiring regular maintenance.

[65] However, DW3 recommended alternative, more cost-effective forms of intervention for long-term erosion control because, based on his observations, he also opined that river bank protection was needed due to man-made disturbance on one side of the river bank:

JUDGE So, you do consider that river bank protection is needed?

CHAN Yes. But, yes. One... My Lady, I think I missed out one thing which is I mentioned in my report. That is, when I walked along the river bank, I observed only one side of the river bank is disturbed whereas the other side is actually more on, is on the natural condition and if there's any erosion is more on the natural erosion rather than man-made activities.

JUDGE Sorry. On the side that is undisturbed?

CHAN Yes. On one side is undisturbed. On the other side we can see some disturbance has occurred.

JUDGE Were you asked to form a view on what caused the disturbance?

CHAN What caused the disturbance? My view is, it definitely would be the man-made. It obviously is man-made activities, yes.

[66] Considering the above, the second defendant's activities may have caused a disturbance to the river bank based on:

(i) circumstantial evidence from the changed condition of the river as shown in the first plaintiff's photographs in 2022; and

(ii) corroborated by DW3's observation of man-made disturbances on parts of the river bank in 2025;

but there was no direct proof of breach by the second defendant of its duty of care, *ie*, that it extracted river sand from parts of Sungai Batang Kali on Lot 1251 and Lot 1252 that were too narrow (7metres) and too near the bank. DW5 confirmed that the second defendant's activities were under LUAS oversight and, to his knowledge, there had not been any breach of any LUAS conditions by the second defendant.

[67] Now the plaintiffs also attempted to argue on this evidentiary question, that the absence of the following survey documents required by LUAS (borehole locations, water levels, any hydraulic structures along the site, river bed levels, river bank levels and lot boundaries) meant that these

documents were not submitted in 2020 and this is not only an act of negligence, but shifted the onus of proof to the defendants to produce such evidence of the condition of the river as at 2020.

[68] This court cannot agree because the burden of proof was at all times on the plaintiffs and no request for discovery of these documents was made at any time since the commencement of the action.

[69] Continued sedimentation at Lot 1251 and plant growth along the banks at Lot 1252 suggested to this court that there was no quantifiable damage to the river. DW3 found for the most part that the river at Lot 1251 was shallow in 2025. As such, the alleged river widening and deepening were not proven.

[70] After considering all the evidence, this court is unable to conclude on a balance of probabilities that the second defendant caused the observable changes to the condition of the river in breach of the pleaded standard of care because there is no clear evidence of non-compliance with LUAS conditions and/or JPS guidelines.

Proof Of Damages

[71] The plaintiffs claimed special damages comprising estimates for the following heads of loss:

(i) cost of riverbank erosion protection with the construction of sheet pile walls;

(ii) compensation for sand material cost extracted from beyond the actual river width (7metres) within the land area;

(iii) land rental costs for the occupied area within the land for the commercial sand mining operation;

(iv) cost of reinstating/replanting of trees damaged by sand mining operation;

(v) cost of a permanent bridge crossing the river due to an increase in the depth of the river to 2metres; and

(vi) lost land area due to excessive sand mining from the actual width of seven to 22metres, making the river wider.

[72] Even if this court is wrong on the threshold question of land ownership and assuming that the river encroachment area does still belong to the plaintiffs, this court considered the factual questions raised whether the second defendant's sand mining operations did cause the plaintiffs to suffer:

(i) property damage, *ie*, damage the river and river banks by causing soil erosion, river widening and deepening, and damage to foliage on the property; and/or

(ii) economic loss, *ie*, loss of rental, loss of land area due to river widening and proceeds from extracted sand.

[73] Considering DW3's evidence, this court cannot tell what section of the river required riverbank protection measures, if any. It suffices to say that this court found the plaintiffs' proposal for permanent sheet pile walls along the entire length of the river and on both river banks in Lot 1251 and Lot 1252, backed by their expert, Ir Ku Adenan bin Ku Ismail (PW4), to be ill-considered and not based on the facts established.

[74] In short, this court finds insufficient evidence of the alleged damage to the river and riverbanks (riverbank erosion, river widening and deepening) or its surrounding areas justifying the proposed construction of permanent sheet pile walls and a bridge crossing, or the replanting of trees or indeed, of the actual amount of costs attached to these activities which were not carried out.

[75] Similarly, the plaintiffs did not satisfactorily prove the value of sand extracted from the riverbanks (as alleged), land rental costs and other components of loss claimed. It is trite that special damages in tort must be specifically pleaded and proved.

[76] In *Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd* [1987] CLJU 79; [1987] 1 LNS 79; [1988] 2 MLJ 672, Edgar Joseph Jr J (as he was then) cited the famous words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel* (1948) 64 TLR 177:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: This is what I have lost, I ask you to give me these damages'. They have to prove it.

[77] In a negligence action where no loss is proved the claim ought to be dismissed and no nominal damages ought to be awarded.

[78] Trespass is a tort of strict liability and so the only question is proof of the quantum of damages if trespass is proven. Thus, even if this court is wrong about its finding on the threshold issue of land ownership and *locus* standi, the plaintiffs would have at best been entitled to nominal damages for the trespass.

The First Defendant's Liability And Right Of Indemnity

[79] The alleged trespass and negligence were actions attributed by the plaintiffs to the first defendant as principal and second defendant as agent. There is no question that the second defendant was the actor whose actions are particularised as the acts of trespass and negligence complained of.

[80] As the same particulars of negligence were pleaded against the defendants, no question of non-delegable duty of care by the first defendant arises on the pleadings or on the facts of this case as they played out at the trial.

[81] As for the case between the first and second defendants, the first defendant argues that the second defendant operated as an independent contractor with no principal-agent relationship between them. This court agrees that the second defendant had all the features of an independent contractor *vis-à-vis* the first defendant:

(i) the first defendant did not exercise any hands-on control over the second defendant's sand mining and extraction operations;

(ii) the second defendant applied for LUAS approvals in its own capacity (not as an agent) and was therefore independently liable to LUAS for any non-compliance; and

(iii) the second defendant provided an express contractual indemnity to the first defendant for liabilities arising from its operations.

[82] It is trite that the employer of an independent contractor is not responsible for any tort committed by the independent contractor in the course of execution of contracted works unless there is evidence to indicate otherwise (*Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409; [2011] 2 MLJ 1).

Counterclaim

[83] The second defendant's counterclaims for libel, breach of agreement on the cost of beautification of Lot 1252 and interference with the second defendant's business were not properly pleaded and were not considered further by this court.

[84] There was no proof of the alleged agreement with the second plaintiff, and as the unproven libel is the basis for any claim for unlawful interference with trade as a tort, all three causes of action failed.

Conclusions

[85] The plaintiff's claim and second defendant's counterclaim are both dismissed. The first defendant's third-party indemnity claim against the second defendant is academic and no orders are made.

[86] Costs are payable by the plaintiffs to the first defendant in the sum of RM50,000 and net costs are payable by plaintiffs to the second defendant in the sum of RM20,000.